

E-002/M-93-719 ORDER DENYING PETITION AFTER RECONSIDERATION

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

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Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of the Petition of
Northern States Power Company
for Approval of a Competitive
Rate for Rahr Malting Company

ISSUE DATE: February 23, 1994

DOCKET NO. E-002/M-93-719

ORDER DENYING PETITION AFTER
RECONSIDERATION

PROCEDURAL HISTORY

On March 3, 1993, Northern States Power Company (NSP or the Company) filed a petition seeking approval of an offer of competitive rates to Rahr Malting Company (Rahr). The matter was assigned Docket No. E-002/M-93-162 (the 162 Docket).

On May 28, 1993, the Commission issued its ORDER REJECTING PROPOSED COMPETITIVE RATE in the 162 Docket. In that Order the Commission found that the proposed competitive rate did not meet certain specific requirements of the competitive rate statute, Minn. Stat. § 216B.162.

Following further negotiations on the proposed competitive rate, Rahr and NSP submitted a second version of the proposed rate, modified to meet the Commission's concerns expressed in the May 28, 1993 Order. The parties' modified proposal was filed July 30, 1993, and assigned Docket No. E-002/M-93-719.

On October 20, 1993, the Commission issued its ORDER GRANTING INTERVENOR STATUS AND APPROVING PETITION AS MODIFIED. In that Order the Commission granted intervenor status to Minnesotans for an Energy-Efficient Economy (ME3). The Commission approved the proposed competitive rate, as filed on July 30, 1993.

On November 5, 1993, ME3 filed a petition for reconsideration.

NSP filed a reply on November 15, 1993. Rahr filed a reply on November 18, 1993.

On November 29, 1993, the Commission issued its ORDER GRANTING RECONSIDERATION for the purpose of tolling the statutory time period for rehearing.

The matter came before the Commission for consideration on January 6, 1994.

FINDINGS AND CONCLUSIONS

I. Introduction

ME3 advanced four arguments in its petition for reconsideration of the Commission's October 20, 1993 decision. ME3 argued that the Commission's decision was erroneous because the Commission improperly treated the July 30, 1993 petition as a modification of the parties' March 3, 1993 petition; NSP will not retain Rahr's load due to the competitive rate; the Commission failed to consider socioeconomic and environmental factors; the Commission failed to find that the competitive rate was consistent with NSP's resource plan. Upon reconsideration the Commission finds that ME3's arguments do not warrant reconsideration of the October 20, 1993 decision. The Commission will examine each of these arguments in turn.

II. The Commission's Treatment of the Parties' July 30, 1993 Petition

A. Positions of the Parties

1. ME3

ME3 argued that the Commission should not have treated the July 30, 1993 petition as a modification because the Commission had rejected the previous petition in its May 28, 1993 Order. ME3 quoted a passage from p. 5 of the May 28, 1993 Order, in which the Commission stated that rejection of the proposal would "allow the parties to restart the process afresh if they choose and fully restore the 90 day reviewing period."

ME3 contended that the Commission's decision treating the July 30, 1993 proposal as a modification failed to comply with the requirements of Minn. Stat. § 216B.162 (7). That statutory section requires a Commission decision on a proposed modification within 30 days; the Commission's October 20, 1993 decision was not rendered until more than 60 days after the July 30, 1993 petition was filed.

Finally, ME3 argued that the Commission was precluded from treating the July 30, 1993 petition as a modification, because no party had sought such an interpretation and parties were not forewarned of the Commission's decision.

2. NSP

NSP stated that the Commission's decision to treat the July 30, 1993 petition as a modification relates to the unique facts of this case. As the Commission observed, both dockets concerned a single set of facts, the parties' ongoing negotiations culminating in a single contract. The Commission's treatment of the proposal as a modification resolved the primary

legal dispute in the case--whether or not to apply the amendment to Minn. Stat. § 216B.162, subd. 7 (4). The Commission's decision against retroactive application of the statutory amendment in this case was a legitimate exercise of its discretion.

3. Rahr

Rahr argued that the subject matter and principal parties of the two dockets were identical. This fact justified the Commission's treatment of the July 30, 1993 contract as a modification. By its rejection of the first contract version in the May 28, 1993 Order, the Commission in effect encouraged the parties to continue their negotiations until the ultimate contract resulted.

Rahr asserted that the true thrust of ME3's argument was not the procedural treatment of the two dockets, but the issue of retroactive application of Minn. Stat. § 216B.162, subd. 7 (4).

B. Commission Action

In its May 28, 1993 Order, the Commission found that an otherwise suitable competitive rate proposal had two specific deficiencies, the cost of capital and depreciation treatment. The Commission was faced with modification or rejection of the proposal. In light of statutory time restrictions on modified proposals, the Commission chose to reject the proposal, noting that the parties would have the opportunity "to restart the process afresh if they choose and fully restore the 90 day reviewing period."

The parties took that opportunity and restarted a 90 day statutory period by filing a revised petition on July 30, 1993. As the Commission stated at p. 4 of its October 20, 1993 Order:

The parties resumed negotiating the terms of the competitive rate, modifying the proposal in an effort to answer the Commission's objections. The parties arrived at a reduced competitive rate discount resulting from the assumption of a higher cost of capital, modified treatment of depreciation expenses, and a revision in the cost of natural gas for the cogeneration machine. Other than the lower competitive rate discount, the terms and conditions of the parties' original competitive rate agreement remained the same.

Treatment of the July 30, 1993 proposal as a modification of the previous proposal was thus consistent with the Commission's May 28, 1993 Order. The same parties reworked the same proposal to remove portions objectionable to the Commission and restarted the 90 day reviewing process by filing the revised contract. The Commission was not precluded by its May 28, 1993 Order from treating the July 30, 1993 proposal as a modification.

The Commission disagrees with the statutory interpretation ME3 applied in its second argument regarding the Commission's treatment of the July 30, 1993 proposal. ME3 misreads Minn.

Stat. § 216B.162, subd. 7 when it argues that the Commission failed to treat the modified proposal within 30 days, as required under the statute. Minn. Stat. § 216B.162, subd. 7 provides for a Commission contract modification, which may or may not be modified in turn by the parties. The Commission is bound by the statute to accept or reject the parties' modification within 30 days.

In this case, the parties themselves have modified the original proposal and have submitted the ultimate contract for Commission approval. This set of circumstances does not trigger the 30 day statutory time limit for a Commission decision. The situation is rather governed by the general 90 day Commission decision timeframe of Minn. Stat. § 216B.162, subd. 7.

Finally, ME3 argued that the Commission's treatment of the July 30, 1993 proposal as a modification was erroneous because the parties had neither asked for such treatment nor been advised of it ahead of time. The Commission is unpersuaded by this argument. The Commission's decision was within its sound discretion and did not require a request by any party. Neither did the Commission prejudice any party by reaching the decision at this point in the proceeding. Further, at the hearing the counsel for Rahr specifically argued for treatment of the July 30, 1993 proposal as the modified product of a long negotiation process between the parties.

III. NSP's Retention of Load

A. Positions of the Parties

1. ME3

ME3 asserted that the proposed competitive rate neither retains Rahr's load for NSP nor defers Rahr's cogeneration. ME3 argued that the proposal does not meet the requirement of Minn. Stat. § 216B.162, subd. 7(3):

That the customer is not likely to take service from the electric utility seeking to offer the competitive rate if the customer was charged the electric utility's standard tariffed rate.

2. NSP

NSP stated that any question regarding NSP's retention of load was resolved by the November 10, 1993 affidavit of John Alsip, III, president of Rahr Malting. In that affidavit Mr. Alsip clarified the history of Rahr's cogeneration construction, the negotiations between the parties, and Rahr's current position regarding the use of the competitive rate versus cogeneration. At p. 3 of the affidavit Mr. Alsip stated:

Based on our conversations with manufacturers, a period of twelve months from the placement of a firm order, possibly less, is all that is required to obtain and install the turbines and complete the [cogeneration] project. Rahr has more than sufficient capital, adequate personnel and the necessary environmental permitting to complete this work and will do so, with the application of due diligence, if for any reason the MPUC order is ultimately overturned and the NSP competitive rate is voided.

3. Rahr

Rahr argued that its representative and counsel stated at the January 6, 1993 hearing that Rahr is ready, willing and able to initiate cogeneration and would do so promptly if the competitive rate were not available.

B. Commission Action

The Commission finds that ME3's assertion that NSP's competitive rate neither retains Rahr's load nor defers its cogeneration is unsupported by facts. NSP's and Rahr's statements and affidavits indicate that Rahr has the capacity to initiate cogeneration and would choose that option if the competitive rate were not available. The Commission will not grant ME3's petition for reconsideration on this ground.

IV. Application of Environmental and Socioeconomic Factors

A. Positions of the Parties

1. ME3

ME3 restated its argument that the socioeconomic and environmental impacts mentioned in amended Minn. Stat. § 216B.162, subd. 7(4) should have been applied in the Commission's consideration of the competitive rate. ME3 contended that the proposed rate would fail to fulfill this requirement of the amended statute.

2. NSP

NSP stated that the statutory amendment was not in effect when the parties' negotiations were commenced and the agreement was filed with the Commission. The Commission had the discretion to determine in this case that it would not include these factors in its analysis.

3. Rahr

Rahr pointed out that the Commission's October 20, 1993 Order contains a discussion of the parties' course of dealings and negotiations which had begun long before the statute was amended. In such a set of facts, fundamental fairness and due process

would indicate that the amended statute should not be retroactively applied. Rahr stated that substantial actions had taken place and Rahr's rights had accrued prior to the effective date of the amendment.

B. Commission Action

The Commission finds that ME3 has offered nothing new to dissuade the Commission from its previous determination. As the Commission stated at p. 6 of its October 20, 1993 Order:

While this matter has been divided procedurally into different dockets, it actually represents a single unified contract negotiation under the terms of the competitive rate statute, culminating in the final contract filed with the Commission on July 30, 1993. During the history of the proceedings, the parties appear to have made good faith efforts to file what is necessary and appropriate under the controlling statute. While the Commission always has the discretion to apply such factors as environmental or socioeconomic values, it would be unfair in this set of facts to widen the scope at this point to apply such factors. Nor would it be fair to find the record insufficient because the filing parties have failed to include evidence of these factors.

In this set of facts, the Commission acted appropriately and within the limits of its sound discretion when it determined that the ultimate contract was a negotiated modification of the previous proposal. It is clearly within the Commission's discretion to confine application of the amended statute to proceedings commenced after its effective date. In this set of facts, fundamental fairness and due process require such treatment.

V. Consistency with NSP's Resource Plan

A. Positions of the Parties

1. ME3

ME3 contended that the Commission had failed to determine if the proposed competitive rate was consistent with NSP's resource plan. ME3 argued that such a determination was required under the terms of the May 28, 1993 Order, in which the Commission stated that it would later consider if the proposal is consistent with the Company's integrated resource plan.

According to ME3, the proposed competitive rate is inconsistent with NSP's resource plans, because NSP has reduced its dispersed generation goals due to lower customer interest in its customer-site generation projects.

2. NSP

NSP stated that its plans to develop customer-site dispersed generation are unrelated to Rahr's self-generation. NSP pointed out that in the case of dispersed generation, NSP owns the facility at the customer's site and the energy produced contributes to NSP's overall capacity. Rahr's proposed self-generation, on the other hand, would be owned by Rahr and would not add to NSP's capacity.

NSP also stated that Rahr's cogeneration plans would have a de minimis impact on NSP's resource plans because of the size of Rahr's load.

3. Rahr

Rahr stated that NSP's resource plan is not relevant to the Commission's present consideration. The terms of Minn. Stat. § 216B.162 are complete in themselves and have been fulfilled in this case.

B. Commission Action

Upon reconsideration, the Commission finds that consistency between the proposed competitive rate and NSP's resource plan is not required under the terms of the competitive rate statute as applied in this matter. Such questions will often be better addressed in the full context of integrated resource planning proceedings.

Even if the Commission were bound to consider the Company's resource plan in this proceeding, ME3 has failed to make a factual showing that the proposed rate and NSP's resource plan are inconsistent.

The Commission continues to find upon reconsideration that the proposed rate fulfills the requirements of Minn. Stat. § 216B.162 as applied in this proceeding.

ORDER

1. ME3's petition for reconsideration is denied.
2. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)